(2) No. 98-578

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1998

*LORENZO COLSTON,*
and
*YOLANDA MICHELLE COLSTON*
Individually and as Next Friend of
Lauren Colston and Quinton Colston, Minor Children,
Petitioners,

v.

*BRYAN BARNHART,*
Respondents.

FILED
NOV 13 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

On Petition for Writ of Certiorari
To the Fifth Circuit Court of Appeals

**RESPONDENTS' BRIEF IN OPPOSITION**

DAN MORALES
Attorney General of Texas

ANN KRAATZ
Assistant Attorney General
Chief, Law Enforcement Defense Division

JORGE VEGA
Deputy Attorney General

*LOUIS CARRILLO
Assistant Attorney General

DREW T. DURHAM
Deputy Attorney General
for Criminal Justice

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 463-2080

ATTORNEYS FOR RESPONDENT

*Counsel of Record

12 pp

## QUESTIONS PRESENTED

1. Whether an actual injury requirement in the context of a claim for retaliation violates the Fourteenth Amendment.

## LIST OF ALL PARTIES

**Petitioners:** Lorenzo and Yolanda Colston

**Respondent:** Bryan Barnhart

## TABLE OF CONTENTS

QUESTIONS PRESENTED ..... i

LIST OF ALL PARTIES ..... ii

TABLE OF AUTHORITIES ..... iv

OPINIONS BELOW ..... 1

STATEMENT OF JURISDICTION ..... 1

CONSTITUTIONAL PROVISIONS INVOLVED ..... 1

STATEMENT ..... 1

REASONS FOR DENYING THE WRIT ..... 3

I. The questions posed by Petitioners do not merit this Court's attention. ..... 3

II. This Court's holdings in *Johnson v. Jones* and *Behrens v. Pelletier* were sufficiently clear so as to require the additional clarification sought by Petitioners. ..... 3

CONCLUSION ..... 7

## TABLE OF AUTHORITIES


| Cases | Page |
|---|---|
| *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) | 5 |
| *Behrens v. Pelletier*, 516 U.S. 299 (1996) | 5, 6 |
| *Cohen v. Beneficial Industrial Loan Corp.* 337 U.S. 541 (1949) | 4, 5 |
| *Colston v. Barnhart*, 143 F.3d 282 (5th Cir. 1998) | 5-7 |
| *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978) | 4 |
| *Johnson v. Fankell*, 117 S. Ct. 1800 (1997) | 7 |
| *Johnson v. Jones*, 515 U.S. 304 (1995) | 3-5, 7 |
| *Marshall v. Sullivan*, 105 F.3d 47 (2nd Cir. 1996) | 5, 6 |
| *Mitchell v. Forsyth*, 472 U.S. 511 (1985) | 4 |
| *Tangwall v. Stuckey*, 135 F.3d 510 (7th Cir. 1998) | 5-7 |

| Constitution, Statutes and Rules | Page |
|---|---|
| 28 U.S.C. § 1254(1) | 1 |
| 42 U.S.C. § 1983 | 1 |
| FEDERAL RULE OF CIVIL PROCEDURE 56 | 5 |
| RULES OF THE SUPREME COURT RULE 10.1 | 3 |

## OPINIONS BELOW

The district court's Memorandum and Order denying Respondent's claim of qualified immunity was unreported and is set out in the Appendix to the Petition at C-1. The panel opinion of the Fifth Circuit Court of Appeals, reversing the district court and rendering judgment, is reported at 130 F.3d 96 (5th Cir. 1997) and is included in the Petitioners' Appendix at A-1. The Fifth Circuit Court of Appeals' denial of *en banc* reconsideration is reported at 146 F.3d 282 (5th Cir. 1998) and is included in the Petitioners' Appendix at B-1.

## STATEMENT OF JURISDICTION

Petitioners seek to invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1). Although Respondent is outside the time limits imposed by Rule 15, waiver of Rule 15 is non-jurisdictional.

## CONSTITUTIONAL PROVISIONS INVOLVED

The rights at issue arise out of the Fourth Amendment to the United States Constitution. The statutory vehicle for Petitioners' suit is 42 U.S.C. § 1983.

## STATEMENT

Petitioner Lorenzo Colston (Colston) was a passenger in a car that was stopped by Respondent Bryan Barnhart (Barnhart), a Texas state trooper, for a routine traffic violation. The entire stop and During the traffic stop, Barnhart discovered that there was an outstanding warrant for the driver of the car. Once the driver was handcuffed, Colston was the only one left to take responsibility for the car.

Although the driver of the car had told Barnhart that Colston had a driver's license, Colston initially denied that he could drive. Colston, who was twenty-nine years old at the time

of the traffic stop, also told Barnhart that he was only eighteen and that his name was "Sylvester." When Barnhart asked Colston to spell "Sylvester," Colston changed his mind and told the trooper that his name was instead "Leo." In the face of Colston's evasive and apparently untruthful answers to routine questions, Barnhart asked Colston to turn around, kneel, and cross his legs in preparation for a pat search.

Colston balked at kneeling and Barnhart repeated his order. Colston eventually complied and, as he went to his knees, Barnhart took out his metal baton. Both Barnhart and a deputy sheriff, who had just arrived at the scene, told Colston to lay down on the ground. Colston refused and instead started to rise, preparing to run. Barnhart and the deputy sheriff both tried to physically restrain Colston and were unsuccessful.

Colston, who was six feet, one inch in height and weighed 225 pounds, was six inches taller and sixty pounds heavier than Barnhart. When Colston stood and tried to run, Barnhart struck him twice with the metal baton. The deputy sheriff tried to physically restrain Colston and a fistfight erupted. Colston knocked the deputy sheriff to the ground, dazed. When Barnhart grabbed for Colston's shirt, Colston hit him in the face with sufficient force to break his eyeglasses and knock him to the ground.

Once the two officers were down, Colston started in the direction of Barnhart's unlocked patrol car and was shot in the arm and buttock by Barnhart. Barnhart's patrol car was equipped with a video recorder and the videotape of the incident described above is a part of the record.

## REASONS FOR DENYING THE WRIT

### I.

**The questions posed by Petitioners do not merit this Court's attention.**

Rule 10.1 of the Rules of the Supreme Court provides that certiorari jurisdiction is a matter of judicial discretion, not of right, and will be granted only when there are special and compelling reasons to justify its exercise. Petitioners have advanced no such reason in this case. Instead, they support their request with inflammatory statements about "rogue police officers" and "open hunting season on African-Americans" and the claim that the courts below, bewildered by the application of this Court's doctrine, are in dire need of direction. Hyperbole aside, their argument that the use of deadly force amounts to an "extra-judicial imposition of the death penalty" seems to indicate that this Court should review every case in which deadly force used is used. Clearly, this is not a result contemplated by Rule 10.1. Likewise, as demonstrated below, the Petitioners fail to demonstrate either that the Fifth Circuit's exercise of jurisdiction in this case was in error or that there exists any general confusion among the courts of appeal in applying this Court's precedent. Thus, Petitioners have advanced no compelling reason justifying the exercise of *certiorari* jurisdiction, and none exist.

### II.

**This Court's holdings in *Johnson v. Jones* and *Behrens v. Pelletier* were sufficiently clear so as not to require the additional clarification sought by Petitioners.**

The Colstons urge this Court to grant *certiorari* claiming that there exists a general confusion among the circuit courts of appeal in the application of *Johnson v. Jones*, 515 U.S. 304 (1995), and that the Fifth Circuit's consideration of Barnhart's

appeal in particular conflicted with the holding in *Johnson*. Barnhart counters that, in their suggestion that further clarification of *Johnson* is required, they overplay the differing conclusions of the courts of appeal. Any disparities in application do not reflect a need for clarification but are instead typical of the evolutionary process following the articulation of a new standard by this Court. Further, qualified immunity and the availability of interlocutory appeal are not, by their nature, questions susceptible to easy or formulaic determinations. As this Court made perfectly clear in *Johnson* and its progeny, whether or not the denial of qualified immunity may be immediately appealed depends on the circumstances of that denial.

The right to appeal a denial of qualified immunity was initially recognized in *Mitchell v. Forsyth*, 472 U.S. 511 (1985). In *Mitchell*, the Court found that the denial of qualified immunity was immediately appealable as a conclusive determination of the issue and as involving a claim of right "separable from, and collateral to, rights asserted in the action." *Mitchell*, 472 U.S. at 527, *citing Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978) *and Cohen v. Beneficial Industrial Loan Corp.* 337 U.S. 541 (1949). The Court's holding was limited, however, to denials of qualified immunity that turn on an issue of law. *Mitchell*, 472 U.S. at 530.

The Court refused to extend *Mitchell's* holding beyond those appeals involving only issues of law in *Johnson v. Jones, supra*. The *Johnson* defendants, although they had asserted qualified immunity, appealed the order denying their summary judgment based on a "we didn't do it" defense. *Johnson*, 515 U.S. at 307-308. An order is based on an issue of law when it concerns only the application of established legal principles, such as whether an official's conduct was objectively reasonable in light of clearly established law, to a given set of facts; an order is not based upon an issue of law when it resolves a fact-related dispute or "evidence sufficiency." The *Johnson* Court concluded that the defendants presented an issue of evidentiary sufficiency, rather than one of law, and declined to exercise jurisdiction. *Johnson*, 515 U.S. at 313, 319-320.

Although the language of *Johnson* may have led some courts to the erroneous conclusion that the existence of any factual dispute will preclude an immunity appeal, this misunderstanding was resolved by *Behrens v. Pelletier*, 516 U.S. 299 (1996). In *Behrens*, the Court made the common-sense observation that "denial of summary judgment often includes a determination that there are controverted issues of material fact" and explained that *Johnson* does not mean that every such denial of summary judgment is unappealable. *Behrens*, 516 U.S. at 312-313.

Under Federal Rule of Civil Procedure 56, a district court may deny a motion for summary judgment if it finds that a genuine issue of material fact remains. FED. R. CIV. P. 56(c). As recognized by the court below, however, such a finding involves two separate determinations: whether the fact in dispute is material and whether the dispute is genuine. *Colston v. Barnhart*, 143 F.3d 282, 284 (5th Cir. 1998). Genuineness of a dispute is measured by whether the evidence is sufficient to permit a reasonable factfinder to find for the nonmoving party and interlocutory appellate review of a district court's finding that a factual dispute is genuine thus foreclosed by the holding in *Johnson*. *Colston*, 143 F.3d 284; *Johnson*, 515 U.S. at 313. The question of materiality, on the other hand, is one of law. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986).

Taken together, *Mitchell*, *Johnson*, and *Behrens* provide coherent instruction for lower courts' determinations on the appealability of qualified immunity issues. Like any rule, the *Johnson* standard requires care in its application and is susceptible to abuse. However, these were the concerns that the Court in *Johnson* specifically rejected and there is no indication that they have become more troublesome in the three years since the *Johnson* decision. Although Petitioners contend that the various courts of appeal are in "hopeless disarray" in applying *Johnson* and *Behrens*, simply noting that in some cases courts have found that they had jurisdiction to review a denial of summary judgment based on qualified immunity while others found that they did not is too simple an analysis. A comparison of *Marshall v. Sullivan*, 105 F.3d 47 (2nd Cir. 1996), and *Tangwall v. Stuckey*, 135 F.3d 510 (7th Cir. 1998), two of the cases cited by Petitioners, is

illustrative of this point.

In *Tangwall*, the district court denied an police officer's claim of qualified immunity when it found issues of material fact concerning the existence of probable cause. Citing *Behrens*, the Seventh Circuit reasoned that the mere existence of a factual dispute did not automatically foreclose an appeal of the denial of qualified immunity. *Tangwall*, 135 F.3d at 515. In holding that it had jurisdiction, the Seventh Circuit found that the factual disputes identified by the district court were immaterial to determining whether the officer's actions were objectively reasonable for purposes of qualified immunity. *Tangwall*, 135 F.3d at 516. Thus, the *Tangwall* court was not presented with the type of evidence sufficiency or "genuineness" problem found in *Johnson*.

The existence of probable cause was also at issue in *Marshall*. In denying the police officer's claim of qualified immunity, the district court found that genuine issues of material fact precluded summary judgment on the issues of whether it was reasonable for the officer to believe that probable cause existed and whether probable cause existed in fact. *Marshall*, 105 F.3d at 54. Finding that itself without jurisdiction, the Second Circuit held that the facts in dispute were both genuine and material. *Marshall*, 105 F.3d at 54. Consistent with the holdings of *Johnson* and *Behrens*, the existence of the evidence sufficiency problem precluded interlocutory appellate review.

Like the courts in *Tangwall* and *Marshall*, the Fifth Circuit's exercise of jurisdiction in this case fell within the parameters of the *Johnson* and *Behrens* holdings. Barnhart's motion for summary judgment on the issue of qualified immunity was denied by the district court based on the court's identification of three fact issues: what information Barnhart possessed immediately prior to and at the moment he fired at Colston, whether Barnhart had a reasonable belief of danger from Colston which would justify the use of deadly force in self-defense, and whether Colston's suit was foreclosed by collateral estoppel. Consistent with both *Johnson* and *Behrens*, the Fifth Circuit found that Barnhart's challenge to the materiality of these facts was within its jurisdiction. *Colston*, 146 F.3d at 285-286. Finding

these facts immaterial to the qualified immunity analysis, the court went on to address the qualified immunity question in light of the facts that remained undisputed. *Colston*, 130 F.3d at 98-99; *Colston*, 146 F.3d 285-286; *see Johnson v. Fankell*, 117 S. Ct. 1800, 1806 (1997) (noting that *Johnson v. Jones* allowed interlocutory appeal where the issue was whether a given set of facts showed a violation of clearly established law).

In closing, there is little support for Petitioners' contention that further clarification of *Johnson* and *Behrens* is necessary to create a workable standard for interlocutory review of a denial of qualified immunity. This Court's holdings acknowledge that in some circumstances interlocutory appellate review of a denial of qualified immunity is appropriate while in other circumstances it is not. It is therefore unremarkable that the courts of appeal have exercised their jurisdiction in some cases and not in others. The Fifth Circuit's conclusion that *Johnson* and *Behrens* permitted it to accept jurisdiction over this case presented no conflict with the holdings of this Court. Further, any variance or disparity in the lower courts' conclusions under *Johnson* is attributable to the differing circumstances faced by those courts and does not warrant this Court's attention or further refinement of *Johnson*. The jurisdictional "quagmire" claimed by Petitioners does not exist and *certiorari* review of their claim is unnecessary.

## CONCLUSION

For the foregoing reasons, the arguments presented by Petitioners in support of their request for a writ of *certiorari* are insufficient to warrant the exercise of this Court's jurisdiction. The petition for writ of *certiorari* should be denied.

Respectfully submitted,

DAN MORALES
Attorney General of Texas

JORGE VEGA
First Assistant Attorney General

DREW T. DURHAM
Deputy Attorney General
for Criminal Justice

ANN KRAATZ
Chief, Law Enforcement Defense
Division

---

*LOUIS CARRILLO
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
(512) 463-2080
Fax (512) 495-9139

ATTORNEYS FOR
RESPONDENTS

*Counsel of Record